The Respondent attempts to make everything that happened between the formal pretrial conference (the minutes of which are recorded) and the trial itself as "Pretrial". Certainly, they are that as a matter of chronological event, but just as certainly not Rule 16 pretrial proceedings.

The record is clear and directly to the effect that the pretrial conference occurred on July 2, 1968 at 4:30 P.M. The minutes thereof have been transcribed and constitute a part of the record. (Please see Appendix C attached hereto).

Unfortunately, the Honorable Court of Appeals did not take into consideration the pretrial order and its effect on the proceedings, and Respondent must sincerely wish that this Honorable Court also deal solely with Rule 39(b) and not with Rule 16.

It is significant to note that Respondent does not discuss anywhere in his brief

Rule 16 of the Federal Rules of Civil Procedure as evidenced by his table of authorities.

Surely, if, as the record reflects, there was only one pretrial conference and hence one pretrial order, the lower court fell into error when that pretrial was not followed and jury trial not afforded.

When the Clerk of the District Court set the cause for a civil nonjury trial, Petitioner moved for jury trial pursuant to Rule 39(b). It should be noted that no formal order on said motion was ever entered and the list of docket entries so reflects an absence of such order.

Petitioner does candidly admit to this Honorable Court that the lower court orally denied said motion. Petitioner respectfully submits, however, that denial of said motion was immaterial as a result

of the following statement of issue:

Should plaintiff's rights pursuant to the pretrial order be given less effect because he moved the Court to correct the Clerk's error and at the same time asked for Rule 39(b) relief?

AN "OFFER" TO SETTLE WITHIN POLICY LIMITS IS NOT THE SINE QUA NON OF AN "OPPORTUNITY" TO SETTLE WITHIN POLICY LIMITS.

Respondent argues that there was a finding by the trial court that there was both no "opportunity" to settle within policy limits and no "offer" to so do. This is true, but in so holding both the trial court and the Court of Appeals equated the two terms, that is "opportunity: and "offer." It is in this legal ruling that error was committed and the factual issues bearing on "opportunity" were never ruled upon.

In these regards the Honorable District Court held:

"Bush further argues that Allstate had a duty upon receipt of the above discussed letter to respond by offering or at best disclosing the policy limits. Refusal to disclose policy limits in return for an offer to settle within coverage (upon such disclosure) does not render the insurer liable for an excess judgment. Chicoine v. State Farm Insurance Company, 223 N. E. 2d 510 (Mass. Supreme Ct., 1967)." (App. 42) (Emphasis supplied)

In like manner the Honorable United States Court of Appeals held:

"When an insured sues to recover such an excess on the ground that the insurer's conduct in failing to effect a settlement within policy limits amounts to bad faith, it must be shown that the insurer had an opportunity to settle the claim against the insured, within policy limits. That is, in refusal-to-settle cases, Florida law does not subject the insurer to liability for bad faith or conduct tantamount to bad faith in the absence of an offer by the person claiming against the insured to settle within the limits of the insured's policy. American Fidelity Fire Insurance Co. v. Johnson, 177 So.2d 679, 683 (Fla. Dist. Ct. App. 1965), cert. denied, 183 So.

2d 833 (Fla. 1966): accord, Seward v. State Farm Mutual Automobile Insurance Co., 5 Cir., 1968, 392 F. 2d 723, 727-728. See also Communale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P. 2d 198 (1958)." (Emphasis supplied)

CONCLUSION

It is respectfully requested that this Honorable Court adopt the Rule of Florida Law so ably set out by Respondent, to-wit: "An Insurer could not be guilty of a bad faith refusal to settle in the absence of an opportunity to settle the claim within policy limits," (Respondent's brief p. 3) but which the District Court and the Court of Appeals misconstrued by requiring that the offer must be made within policy limits.

In its present posture the law of Florida would allow an insurance carrier to gamble its insured's money with impunity unless plaintiff's counsel were

astute enough to phrase a demand, which was for an amount within the limits of insurance. It is the party who has no control of the litigation, the insured, who suffers as the result of an unjust law making him responsible for his adversary's mistakes and his insurance company's callousness to his interests by "gambling" the outcome of trial.

Respectfully submitted,

By Richard A. Sicking
Richard A. Sicking

By Donald Feldman
Donald Feldman

APPENDIX C

Docket Entries

1968

Mar. 6 Stip. & Order allowing withdrawal of Fleming, O'Bryan & Fleming and substituting Donald Feldman as counsel for Pltf.

Mar. 14 Order for pre trial conference Mon., 5/27/68 at 4:00 PM, Judge Atkins.

Apr. 19 Motion for Production of Documents, etc., filed by Plaintiff.

Apr. 19 Motion for Continuance, filed by Plaintiff.

Apr. 19 Notice of hearing on 5/13/68 at 2:00 P. M.

May 8 Notice of taking deposition of Eugene Fisher, Esq.

May 17 Order on Motion to Produce is hereby granted. (5/13/68/CCA)

17 Order on Motion for Continuance is hereby granted, and Pre-Trial Conference is set for June 10, 1968 at 11:00 A.M. (5/13/68/CCA)

29 Deposition of H. Eugene Fischer.

June 14 Amended Order granting Motion for Continuance and setting Pre-Trial Conference: (1) Pre-Trial Conference is set for July 2, 1968, at 4:30 P.M., and Pre-Trial Stipulation entered into by parties must be filed June 24, 1968. (c/13/68/CCA)

June 24 Memorandum Re The Question of Negligent Preparation and other Negligent Aspects of Defense in Establishing The General Issue of Presence or Absence of Good Faith, filed by Plaintiff.

June 24 Pre-Trial Stipulation, filed by Plaintiff & Defendant.

June 20 Re-notice of taking deposition of JAMES W. McCARTY, on 6/20/68 at 10:30 A.M.

July 5 Notice of filing excerpts of Testimony in lawsuit of LUMMIE McCORD

GRANT VS WILLIAM E. BUSH in Circuit Court of Seventeenth Judicial Circuit of Florida, Case No. L65-896, filed by Plaintiff.

July 5 Excerpts of Testimony taken on 7/11/66, and Excerpts of testimony taken 7/12/66.

9 Motion for Summary Judgment, filed by Defendant, ALLSTATE INSURANCE CO.

9 Notice of hearing on 7/18/68 at 11:30 A.M., before Judge Atkins.

12 Re-Notice of Hearing. September 9, 1968 2:00 CA

15 Re-Notice of Hearing. September 9, 1968 10:00 Motion for Summary Judgment

19 CIVIL NON JURY TRIAL. Sept. 16, 1968 10:00 CA

25 Motion for Setting of Cause of Trial By Jury, Pursuant to Federal Rules of Civil Procedure 38 and 39.

25 Notice of Hearing. Sept. 9, 1968 2:00 CA

Sept.12 Deposition of JAMES W. McCARTY

Sept.6 Memorandum of Law in opposition to Motion for Jury Trial, filed by Deft. ALLSTATE INSURANCE CO.

19 TRIAL BY THE COURT WITHOUT A JURY - Proceedings on trial.

20 NON-JURY TRIAL RESUMED - Continued until Sept. 26,. 1968 or sooner.

Oct. 4 Non-jury trial resumed and concluded. Special Findings-of-Fact and Conclusions of Law to enter. (CCA)

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1969

Oct. 16 Notice of Points to be raised on Appeal, filed by Plaintiff.

Oct. 16 Notice to Court Reporter for preparation of parts of record on appeal.

22 Transcript of hearing at pretrial conference on 7/2/69

22 Transcript of hearing on Motion for New Trial on 3/24/69

22 Directions to the Clerk to retain record on appeal in District Ct. in accordance with Rule 11, and to submit copy of docket entries in lieu of appellate papers, filed by attorneys for appellant.

23 Certificate of the readiness of record on appeal.

CLERK'S CERTIFICATE.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Reply Brief was mailed to Dean, Adams, George & Wood, attorneys for Respondent, Concord Building, Miami, Florida 33130, and that all parties required to be served have been served this 21 day of September, 1970.

Richard A. Sicking

Richard A. Sicking

Donald Feldman

Donald Feldman